The determination of that question depends upon the view that is taken of the matter after consideration of the circumstances of each case.

In my judgment, on the facts of the present case, it cannot be said that the car was being driven by Yong Choy with Ho Nee San's implied permission. As no express permission was given, the car was driven by Yong Choy without any permission whatsoever from Ho Nee San. In the result the defendants are not liable to pay the sum claimed by the plaintiffs and there must be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors:—*Donaldson & Burkinshaw*; *Battenberg & Talma.*

THE KAMPONG KUANTAN RUBBER CO. LTD. v. V.K.G. MENON

[O.C.J. (Gill J.) August 5, 1963]

[K.L. — Civil Suit No. 34 of 1960]

Practice and procedure—Service out of jurisdiction—Order granting leave to issue writ—Affidavit in support not stating that plaintiff had good cause of action—R.S.C. 1957, O.11 r.4—Whether order vitiated by defect.

Practice and procedure—Service out of jurisdiction—May be served on defendant when he comes within jurisdiction—Service on agent—No irregularity.

An order granting leave to issue a writ for service out of the jurisdiction will be set aside if the affidavit in support of the application does not state that the deponent believes that the plaintiff has a good cause of action as required by R.S.C. O.11 r.4. *Vaudrey & Ors.* v. *Nathan* (3) followed.

Observations on when writ for service out of jurisdiction may be served within jurisdiction.

Cases referred to:—

(1) *Kinahan* v. *Kinahan* (1890) 45 Ch. D. 78.

(2) *Dickson* v. *Law and Davidson* [1895] 2 Ch. 62, 65.

(3) *Vaudrey & Ors.* v. *Nathan* [1928] W.N. 154.

(4) *Ban Aik & Co.* v. *K. U. Chuan* [1934] M.L.J. 119.

(5) *Western Suburban & Notting Hill Permanent Benefit Building Society* v. *Rucklidge* [1905] 2 Ch. 472.

MOTION.

Athi Nahappan for defendant/applicant.

S. D. K. Peddie for plaintiff/respondent.

Cur. Adv. Vult.

Gill J.: This is a motion by the defendant to discharge the order granting leave to issue the writ in these proceedings for service outside the jurisdiction and/or to set aside the writ and/or to discharge the order for substituted service of the amended writ and/or to set aside the service of the amended writ.

The brief history of the proceedings in this suit is as follows. On an application filed on 5th February, 1960 by way of summons in Chambers an order was made on 16th February, 1960 granting leave to the plaintiff to issue a writ against the defendant and to serve a notice of writ on him in India. The writ was renewed from time to time, the last of such renewals being made under an order dated 9th August, 1962. The writ as well as the notice of writ and the statement of claim was amended on a fiat to amend dated the 18th June, 1962. On 9th August, 1962 an order was made for service of the amended writ or the amended notice of writ on Mr. Athi Nahappan of Messrs. Athi Nahappan & Co., Advocates and Solicitors, Kuala Lumpur. A copy of this order together with a copy of the amended writ and a copy of the amended statement of claim were duly served on Mr. Athi Nahappan on 29th January, 1963.

The application for the order granting leave to issue the writ was supported by the affidavit of Donald Eric Teale, the Director/Secretary of the local agents of the plaintiff company. In paragraph 4 of this affidavit dated the 4th February, 1960 it was stated as follows:—

"The intended defendant had fraudulently used and converted to his own use the intended plaintiff's money to the extent of $4,661.39 whilst employed as Chief Clerk as stated in paragraph 3 above."

The affidavit did not state that in the belief of the deponent the plaintiff had a good cause of action, as required by Order 11 Rule 4 of the Rules of the Supreme Court, 1957. The question is whether this failure to comply with the provisions of Order 11 Rule 4 vitiates the order granting leave to issue the writ for service outside the jurisdiction.

It is to be observed that our Order 11 Rule 4 is identical with Order 11 Rule 4 of the English Rules of the Supreme Court. English authorities seem to differ as to the effect of the omission to testify to a good cause of action. In *Kinahan* v. *Kinahan,*(1) where the action was for an infringement of the plaintiffs' trade mark, an order obtained *ex-parte* by the plaintiffs, under Rules of the Supreme Court, 1883, giving them leave to issue and serve the writ in Ireland was discharged on the ground that the action was to be regarded as practically an Irish and not an English action. Kekewich J. had this to say as regards the omission to testify to a good cause of action:—

"There is a statement which may be and was in fact accepted as an equivalent, namely, that the Defendants

were infringing the Plaintiffs' trade-mark; but the plain statement which the affidavit ought to have contained, and for the omission of which there really is no excuse, is not there."

In *Dickson* v. *Law and Davidson* [2] it was held that the omission was a mere irregularity and not a matter of substance. North J. stated in that case as follows:—

"And so, I think, when there is enough to satisfy the Court that the plaintiff has a good cause of action, the absence of a formal affidavit to that effect is not a matter of substance; and though, if my attention had been directed to the point when I made the order, I should have required such an affidavit to be made, I do not think I am bound by reason of its absence now to set aside the service of the writ."

In *Vaudrey and Others* v. *Nathan* [3] the plaintiffs' claim was for fees for work done and money expended as solicitors. Hawke J. made an order for leave to issue a concurrent writ against the defendant and for leave to serve a writ upon the defendant in Monte Carlo or elsewhere in the State of Monaco. The defendant applied to set aside the order on the ground that the affidavit was not sufficient. Humphreys J. dismissed the summons. On appeal to the Court of Appeal, the order for service out of the jurisdiction was set aside. Scrutton L.J. gave the following judgment in that case:—

"The power of our Superior Courts to allow service out of the jurisdiction must be exercised with great care and circumspection. In some countries it is looked upon with great disfavour. Order XI of the Rules of the Supreme Court lays down the conditions upon which the leave may be given. One of these is that the affidavit in support of the application for leave should state that the deponent believes that the plaintiff has a good cause of action. In my view a statement to that effect is vital, and the Court ought not to grant leave unless the application is supported by the evidence on oath of a responsible person that he believes in the plaintiff's claim, and it would be a very bad precedent to grant the application in the absence of such testimony."

Vaudrey's case was followed by Mills J. in the Singapore case of *Ban Aik & Co.* v. *K. U. Chuan* [4] in setting aside the order made in that case for service out of the jurisdiction.

It has been argued in the present case that paragraph 4 of Mr. Teale's affidavit sets out the nature of the plaintiffs' claim against the defendant and it is implied in that statement that the plaintiff has a good cause of action. I do not agree. It is clear from Order 11 Rule 4 that the affidavit must state (a) the ground upon which the application is made: this means the nature of the proposed cause of action and the relief sought and sufficient facts to enable the Court to decide whether the case is a proper one under Order 11 Rule 1; (b) that in the belief of the deponent the plaintiff has a good cause of action; and (c) in what place or country such defendant is or probably may be found. If the affidavit fails to satisfy any of the three conditions specified above, the Court will not make an order for service outside the jurisdiction. It is clear that condition (b) was not satisfied in the present case, therefore, in the light of such weighty authority as the decision of the Court of Appeal in *Vaudrey and Others* v. *Nathan* I feel I have no option but to grant the defendant's application, and accordingly I discharge the order for leave to issue the writ and make an order that the plaintiff do pay the defendant the costs of this application.

Although the order I have made will get rid of the action altogether, so that it is not necessary to deal with any of the other matters raised by the defendant in his Notice of Motion, I must state that I find no merit in any of those matters. It is contended that the writ was bad in law in that it was dated the 5th day of February, 1960, but I am satisfied on the evidence that the writ was not issued until long after the order for its issue was made. It is clear that no steps were taken to have the writ issued prior to the date of the order of the Court made on 16th February, 1960 and that it was wrongly dated the 5th February, 1960 through an error by the Court when it was ultimately issued for service. I also find no irregularity in the order for substituted service made on 9th August, 1962. Where a writ has been issued for service out of the jurisdiction when the defendant is abroad, it may be served on him if he comes within the jurisdiction, although it is not in the form used for service within the jurisdiction. Consequently there is no irregularity in its service on an agent of the defendant within the jurisdiction on an order for substituted service. I find support for this proposition in the case of *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge.* [5] If there was no irregularity in the order for substituted service, the service itself was perfectly valid.

Order accordingly.

Solicitors:—*Athi Nahappan & Co.; Skrine & Co.*

KWAN TECK MENG & ORS. v. LIEW SAM LEE

[O.C.J. (Gill J.) August 6, 1963]

[K.L. — Civil Suit No. 45 of 1962]

Land Laws—Transfer by way of gift—Death of transferor before registration—Whether transfer void—Land Code ss.42(iii) & 85(ii)—"Void"—Meaning of.

Landlord and Tenant—Beneficial interest—Lease under Land Code s.47—Notice—Premises required by owners for own use—Greater hardship.

Contracts (Malay States) Ordinance, 1950, s.26—